

(August 10. 1753.)

R E P L I E S

FOR

James Towart Tenant in *Auchindinnan*,

T O

The ANSWERS for *George Buchanan* Senior, Merchant in *Glasgow*, and *John Hendrie* Procurator-Fiscal of the Justice Court of the Shire of *Dumbarton*.

JAMES TOWART having unfortunately fallen under the Displeasure of *Mr. Buchanan* the Respondent, and some of his Friends, has been by that means exposed to uncommon Oppression: For tho' he be a Person whose Reputation was fair and entire, ever till they and he happened to fall in Variance; Mean or Method has since been left unattempted to harass, ruin and destroy him.

In these Answers your Lordships will see plain Proofs of the Respondent's Rancour. The poor Man being Tenant in *Auchindinnan*, happened to cut some Timber on *Mr. Buchanan's* Grounds, for repairing the Houses, and making Instruments of Husbandry for his Farm: A Thing which the several Tenants in that Part do oft as they have Occasion for it, to answer the above Purposes; and which is understood to be their Privilege; and, tho' done openly, never was challenged, at this Time.

When *James Towart* cut this Timber, in *March 1752*, he made no Secret of the Thing: He got some of his Neighbours to assist him in carrying the Timber to his House; and had no Suspicion that he had done any Thing which he had not a good Right to do.

However *Mr. Buchanan*, with Concourse of the Procurator-fiscal, was pleased, on the 2d of *July* last, to give in a Complaint to the Justices of Peace of *Dumbarton* Shire, libelling, That the said *James Towart* had, within these five Years, cut a great many Trees; and therefore concluding, That, in terms of the Statute of *Georgii*, he should be imprisoned and whipped.

Upon this the poor Man was brought before the Justices: And confiding in his Innocence, tho' he cannot so much as write his own Name, he did not think of calling for a Procurator to make his Defence; but made it himself. He, without the least Hesitation, own'd that he had cut Timber: But said, He did so, because he considered it to be his Right, for the Reparation of his Houses, and for making Instruments of Husbandry; and that he did nothing but what the other Tenants did. Upon which immediately he was asked, If the Pursuer had given him Liberty? And he having honestly answered *he had not*, this was taken down in Writing, as a momentous judicial Declaration; without making Inquiry, From whom the Suspender took the Lands? which was extreme proper, considering *Mr. Buchanan* has only Right to the fourth Part of them, lately acquired.

After this, a great many Witnesses were examined; and, with great Anxiety, a Proof was brought, That there were a great many Trees cut in the Woods of *Auchindinnan*; but no Proof whatever, That this poor Man cut any of them, except two Ash-Trees in *March 1752*.

The Pursuer having concluded his Proof, *James Towart* was allowed to adduce what Witnesses he could for his Vindication; but no Day assigned for that Purpose; and two were called in, who happened to be present, who swore *they heard it reported, the Tenants of Auchindinnan had Liberty to cut Arn and Hazel for the Use of the Town.*

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As the Tenants of *Auchindinnan* were 'at no great Distance, upon this Occasion, it would been expected they should been called as Evidences; but the poor simple Man did not it seems think of that: But tho' he did not, with great Submission, it was incumbent upon the Justices to have suggested it to him; nay, *ex officio*, they ought to have called them and examined them, and then the Fact would have come out as he set it forth. But no such Thing was done; nay, tho' one of the Tenants of *Auchindinnan*, was examined for the Pursuer to prove *James Towart's* cutting, not a Question was put to him, whether he did not the same himself, and if he did not believe all the Tenants had Right to do so? But in Place of this, the Justices ordered the poor Man to be imprisoned for four Months, whipped at the End of every Month in Terms of the Statute first, *Geo. I.* and besides, by virtue of their own Law, to pay 40 Shillings to the Fiscal.

Of this Sentence, *James Towart* having presented a Bill of Suspension, Answers are made to it; and to obviate what is set forth in the Answers, these Replies are humbly offered.

The single Question is, Whether this severe Sentence of the Justices is well founded or not? And from what has been already said, it is hoped your Lordships will be of Opinion, that it is a very rash Sentence. Matters of this kind, where the Punishment was to be four Months Imprisonment and four Whippings, merited to have been enquired into with Accuracy, in Place of going to Work as was here done, at a single Sederunt, hurrying on Matters without calling for the Persons, who from the Defence offered, it was plain were absolutely fit to be examined, and who would have proved the Fact.

It is said in the Answers, That *James Towart* might have done this, if he had thought fit. But if the poor Man did not think, and was not capable to suggest, what was fit, it was, with great Submission, the Duty of the Justices to have been of Council for him, and, out of Regard to Justice, called the other Tenants of *Auchindinnan* before them, and examined them upon his Allegation; and assigned a Day for this Examination. But, in place of that, all was concluded at a Sederunt.

Mr. *Buchanan* is pleased to set forth in his Answers, That the Sentence of the Justices was well-founded. And the Reasons for it may be reduced to these Heads: 1. That the Suspender, as he is pleased to set forth, was sometime ago accused for stealing a Sheep, and is just now under Process for stealing a Goat; and that, on account of the first of these, he had been laid under the Necessity to consent to voluntary Banishment, by signing Indentures to go to *Jamaica*.

As to the stealing of the Sheep, there never was an Accusation more groundless, and the Party in whose Name it was made, durst not prosecute it; but on the contrary, was prosecuted by the Suspender before the Sheriff Court, for the Acts of Oppression which he committed, under Colour of a Warrant granted to search for his Sheep, pretended to be stolen; wherein the Suspender's Innocence not only appeared, but likewise that the stealing of the Sheep which was afterwards found, was a mere Fiction, as is likewise that of the Goat, for which the Suspender was never prosecuted. It would be improper to trouble the Lords with the History of the Indentures, and the oppressive Usage which was had in Relation thereto, further than to inform, That of these Indentures, there is a Process of Reduction depending in this Court against one *Leckie*, upon the Head of Falshood; and that so far was the Suspender from stealing out a Suspension thereof, that he was imprisoned on a Warrant said to be founded thereon; and he obtained Letters of Liberation from that Imprisonment, after Answers were given in to his Bill, which at two different Diets was the Subject of Consideration of three of your Lordships Number, which the Charger, who is *Leckie's* Correspondent and Negotiator, cannot have been ignorant of; and therefore it was injurious in him to bring in extraneous Matter, and Misrepresentations of Fact into this Case; which speaks out the Spirit he is of; for who else would maintain, that because a Person has been thus accused unjustly of Sheep and Goat-stealing, that therefore he should be whipped for an unjust Charge of Wood-cutting?

The Charger is likewise at great Pains to set forth, That there have been a great many Trees cut in his Wood. The Fact shall not be controverted by the Suspender, because there are several Tenants who are supplied out of them; but, in no View, can the Suspender be answerable for what there is no Evidence he did cut. And as to these, they were only for the Use of the Farm: For though it appears that his Wife, when he was in Prison on account of Mr. *Leckie's* groundless Accusation, disposed of some Cart-treads, he cannot be answerable for her Conduct; and besides, tho' he had ordered it himself, or even sold a complete Cart to answer his Necessities, that would be no Point of Dittay, as the Timber was cut intentionally to be employed in the Use of the Farm, so not maliciously. And as to what is said of the Stoles of the Trees being covered up, the Suspender knows nothing about it: but is positive this was not done by him; and never can be supposed done by him with any View to conceal, because he cut the two Trees openly, and they grew in a Place where their being cut could not remain a Secret.

The Supender, though he is advised he has no Occasion for it, has likewise pleaded Prescription upon the Statute of Queen *Elisabeth*, by which it is enacted, "That all Actions, Suits, Bills, Inditements or Informations, which after 20 Days after this Statute shall be had, brought, sued or exhibited for any forfeiture, upon any Statute-Penal, made or to be made, whereby the Forfeitures is or shall be limited to the Queen, her Heirs or Successors only, shall be had, sued or exhibited within two Years after the Offence committed, and not after two Years; and that all Actions, Bills, Suits or Informations which after the said 20 Days shall be had, sued or commenced for any Forfeiture, upon any Penal Statute made or to be made, except the Statute of Tillage, the Benefit whereof is, or shall be limited to the Queen, her Heirs or Successors, and to any other who shall prosecute in that Behalf, shall be had, brought, sued and commenced by any Person that may lawfully pursue for the same within one Year after the Offence committed; and in default of such Pursuit, that then the same shall be had, sued, exhibited or brought for the Queen's Majesty, her Heirs and Successors at any Time within two Years after that Year ended, and if any Action, Suit, Bill, Inditement or Information for any Offence against any Penal Statute made or to be made, except the Statute of Tillage shall be brought after the Time in that Behalf before limited, that then the same shall be void and of none Effect, any Act or Statute to the contrary notwithstanding.

This law, which must govern all the subsequent Statutes, and particularly the Statute 1st, *Geo. I.* abovementioned, seems to put the Matter in a clear Light; for by the Act *Geo. I.* Action is allowed in these Words *to the Inhabitant of the Parish, vill Hamlet, or Place where the Trees are cut, and to the Owner of the Trees, or to any other Person*; consequently the King has no proper Title to sue; and the Action expired upon the Lapse of the Year, from the Time the Offence is charged to have been committed. And as the last cutting was in *March 1752*, and no Action was commenced till *July* last, the Prescription was run: And thus of the King's having no Title to sue on this Statute, is a further Argument of the Irregularity of the Justices, in decreeing a Fine of 40 Shillings to the Fiscal, who had no Title *qua* such to sue.

ALEX. BOSWELL.

